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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
BUTTE DIVISION

STEVE KELLY and CLARICE )  
DREYER, Plaintiffs, )  
 )  
v. )  
 )  
LINDA McCULLOCH, in her )  
official capacity as Secretary of )  
State of the State of Montana, )  
Defendant. )  
\_\_\_\_\_

Case No. 2:08-cv-25-SEH

## **STATEMENT OF UNDISPUTED FACTS**

### **Jurisdiction and Venue**

1. This action arises under the Constitution and laws of the United States.

- Defendant's Response to Plaintiffs' First Requests for Admission ¶ 1 ("Defendant's First Admissions").

2. The plaintiffs brought this action to redress the alleged deprivation, under color of State law, of rights secured by the Constitution of the United States.

- Defendant's First Admissions ¶ 2.

3. Venue is proper in the District of Montana pursuant to 28 U.S.C. § 1391(b).

- Verified Complaint, filed April 8 (doc. no. 1), ¶ 5.
- Answer, filed May 7, 2008 (doc. no. 7), ¶ 5.

### **Parties**

4. Plaintiff Steve Kelly is a United States citizen.

- Verified Complaint ¶ 6.
- Answer ¶ 6.

- Defendant's First Admissions ¶ 3.
5. Kelly is a resident of Gallatin County, Montana.
- Defendant's First Admissions ¶ 4.
6. Kelly is a registered to vote in Gallatin County, Montana.
- Verified Complaint ¶ 7.
  - Answer ¶ 7.
  - Defendant's First Admissions ¶ 5.
7. Kelly ran for Congress as an independent candidate in 1994.
- Verified Complaint ¶ 8.
  - Answer ¶ 8.
8. Kelly wanted to run as an independent candidate for the United States Senate in the 2008 general election.
- Verified Complaint ¶ 8.
9. Plaintiff Steve Kelly meets the qualifications to hold the office of United States Senator.
- Defendant's First Admissions ¶ 7.
10. Plaintiff Clarice Dreyer is a United States citizen.

- Verified Complaint ¶ 9.
  - Answer (defendant did not deny).
  - Defendant's First Admissions ¶ 10.
11. Dreyer is a resident of Gallatin County, Montana.
- Defendant's First Admissions ¶ 11.
12. Dreyer is registered to vote in Gallatin County, Montana.
- Verified Complaint ¶ 10.
  - Answer ¶ 10.
  - Defendant's First Admissions ¶ 12
13. Dreyer wanted to have the opportunity to vote for Steve Kelly in the 2008 general election.
- Verified Complaint ¶ 10.
14. Defendant Linda McCulloch is the Secretary of State of the State of Montana.
- Defendant's First Admissions ¶ 15.
15. McCulloch is sued in her official capacity only.
- Defendant's First Admissions ¶ 17.

### **Factual Background**

16. Montana enacted its first ballot-access law for independent candidates in 1889. 1889 Mont. Laws 135. Under that statute, an independent candidate for non-presidential statewide offices could get on the ballot by submitting a petition containing the signatures of at least 100 eligible voters 30 days before the general election. There was no filing fee.

- Defendants' First Admissions ¶ 18.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

17. An 1895 statute raised the signature requirement from 100 signatures to 5% of the total votes cast for the successful candidate for the same office in the last general election. See Montana Constitution, Codes & Statutes 1895, part 3, title 2, ch. 8, sec. 1313, p. 106. The deadline was 30 days before the general election, and there was no filing fee. This signature requirement remains in effect today.

- Defendants' First Admissions ¶ 19.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

18. In 1949, the Legislature moved the petition filing deadline for independent candidates to 90 days before the general election, which falls in early August. 1949 Mont. Laws Ch. 160.

- Defendants' First Admissions ¶ 20.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

19. In 1973, the Legislature moved the petition filing deadline for independent candidates to March, one week before the filing deadline for June party primary election. 1973 Mont. Laws Ch. 237. There was no filing fee.

- Defendants' First Admissions ¶ 21.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

20. In 1979, the Legislature imposed a filing fee equal to 1% of the annual salary of the office sought. 1979 Mont. Laws Ch. 571.

- Defendants' First Admissions ¶ 22.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

21. In 1991, the Legislature moved the petition filing deadline for independent candidates to June, one week before the day of the June primary. 1991 Mont. Laws Ch. 591.

- Defendants' First Admissions ¶ 23.
- 30(b)(6) Deposition of Allan Miller 51-52 (Ex. 7.)

22. The Legislature last amended the ballot-access scheme in 2007. 2007 Mont. Laws Ch. 458. The Legislature once again moved the petition filing deadline to March, one week before the filing deadline for the June party primary election. Mont. Code Ann. ' 13-10-503. The 5% signature requirement and filing fee remained. Mont. Code Ann. ' 13-10-502.

- Defendants' First Admissions ¶ 24.

23. All petitions must be submitted to the election official of the county where each petition-signer resides. Mont. Code Ann. ' 13-10-503. As a practical matter, this means that petitions have to be county-specific. Residents of Lewis and Clark County have to sign a Lewis and Clark County petition, for example, and residents of Cascade County have to sign a Cascade County petition. A

statewide candidate therefore has to have at least one set of petitions for each county in which the candidate gathers signatures.

- Defendants' First Admissions ¶ 25.

24. For the office of U.S. Senator in 2008, Montana's ballot-access scheme for independent candidates required plaintiff Kelly to submit petitions containing at least 10,243 valid signatures on March 13, 2008 – 236 days before the November 4 general election at which Kelly sought to appear on the ballot. The filing fee, due on March 20, was \$1,693.

- Defendants' First Admissions ¶ 26.

25. The 2007 amendment to the filing deadline makes it impossible for a prospective candidate to gather signatures outside of the polls on the day of Montana's school elections, which are held annually in early May.

- Defendants' First Admissions ¶ 31.

26. Montana's ballot-access scheme for candidates affiliated with qualified political parties, by contrast, does not require the candidate to submit any signatures.

- Defendants' First Admissions ¶ 32.



27. A qualified party is any party that had a candidate for statewide office who met a certain vote threshold in either of the last two general elections or that submitted a party-qualifying petition containing at least 5,000 valid signatures from registered voters in at least one-third of Montana's legislative districts. Mont. Code. Ann. ' 13-10-601.

- Defendants' First Admissions ¶ 33.

28. Qualified parties nominate their candidates by primary election, and their nominees appear automatically on the general-election ballot. In order to appear on the primary-election ballot, candidates need only to submit a declaration for nomination and pay the filing fee. The declaration-for-nomination form does not require the candidate to collect or submit any petition signatures, and the form is due 75 days before the primary election at which the candidate seeks to appear on the ballot. Mont. Code Ann. ' 13-10-201.

- Defendants' First Admissions ¶ 34.

29. For the office of U.S. Senator in 2008, candidates seeking the nomination of a qualified political party were required to file a

declaration-of-nomination form, along with a filing fee of \$1,693, on March 20, 2008 – 75 days before the June primary election at which the candidates sought to appear on the ballot. The candidates were not required to submit any petition signatures.

- Defendants' First Admissions ¶ 35.

30. The declaration-for-nomination form does not require a qualified-party candidate to collect or submit any petition signatures.

- Verified Complaint ¶ 18.
- Answer ¶ 19.

31. The form is due 75 days before the primary election at which the candidate seeks to appear on the ballot. Mont. Code Ann. ' 13-10-201.

- Verified Complaint ¶ 19.
- Answer ¶ 19.

32. There has been only one independent candidate for U.S. Senate in the State's 119 years – Joseph P. Monaghan in 1936, when the petition filing deadline was in October. (Ex. 1 at 9.) Since 1973, when the Legislature moved the filing deadline from August to

March, there has been only one independent candidate for *any* non-presidential statewide office on the general election ballot.

- Ex. 1 at 11-13.

33. Plaintiff Steve Kelly petitioned successfully for ballot access as an independent candidate for the United States House of Representatives in 1994, when the petition filing deadline was in June.

- Ex. 12

34. No independent candidates for non-presidential statewide offices have ever been able to get on Montana's ballot when the deadline was in March.

- Ex. 1 at 11-13

35. In absolute terms, Montana's deadline for Senate candidates in 2008 was the third earliest in the nation.

- Ex. 5 at 6-7.

36. Only Mississippi (January 11) and Ohio (March 3) had earlier deadlines, but, because both of those states held their party

primaries in March, neither of those deadlines gave qualified parties as much of a head start as did Montana's.

- Ex. 5 at 6-7.

37. On the other end of the spectrum, twenty-seven states had petition filing deadlines later than June 30.

- Ex. 5 at 6-7.

38. Eleven states had deadlines in July. Thirteen states had deadlines in August. Three states had deadlines in September. Only seven states – Idaho, Ohio, Mississippi, Montana, Nevada, Tennessee, and Utah – had deadlines before May 1.

- Ex. 5 at 6-7.

Respectfully submitted,

/s/ Elizabeth L. Griffing  
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